

# PUBLIC INTEREST LAW CENTER OF PHILADELPHIA

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July 21, 2000

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Title VI Guidance Comments  
U.S. Environmental Protection Agency  
Office of Civil Rights (1201A)  
1200 Pennsylvania Avenue N.W.  
Washington, D.C. 20460

Ladies & Gentlemen:

We are herewith sending you our comments re: the EPA's.

- Draft Revised Guidance, and
- Draft Recipients Guidance

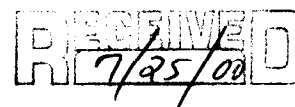
of June 16, 2000

Yours truly,

Jerome Balter, Esquire  
Director  
Environmental Law Project

JB/pas  
Attachment

Affiliated with the  
Lawyers Committee  
for Civil Rights  
Under Law



**COMMENTS RE:**

**THE U.S. ENVIRONMENTAL PROTECTION AGENCY  
DRAFT REVISED (EPA) GUIDANCE  
AND DRAFT RECIPIENTS GUIDANCE (6/16/00)**

**SUBMITTED BY PUBLIC INTEREST LAW CENTER OF PHILADELPHIA  
JEROME BALTER, ESQUIRE**

**July 21, 2000**

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**I. EPA's TITLE VI HISTORY**

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal financial assistance from adversely discriminating against persons on account of race, color or national origin, 42 U.S.C. § 2000d et seq. The act requires each federal agency to promulgate regulations to effectuate the purpose of the Act, 42 U.S.C. § 2000d-1. The United States Environmental Protection Agency (EPA) first promulgated its Title VI regulations in 1973 and then revised them in 1984, 40 CFR § 7.10 et seq.

The EPA annually provides the 50 states (and their local subsidiaries) with very substantial financial assistance for the operation of their respective environmental protection programs. But in the entire history of the EPA it has never investigated the Title VI program or activities of any state in respect to environmental civil rights and it has never found a Title VI environmental civil rights violation among any of the more than 50 administrative civil rights complaints filed with the EPA.

This "no violation" Title VI history stands in sharp contrast to the numerous research reports over the past decades, both private and public, revealing the unfair and unequal concentration of waste treatment and waste disposal facilities in close proximity to minority communities. These waste facilities are universally unwanted, and

universally opposed by all communities, minority as well as white. It was this history and the pressure from minority communities across the country that caused the President to issue Executive Order No. 12898 on February 11, 1994, which mandates all federal agencies to undertake actions and programs to overcome environmental injustice against minorities and low-income communities.

## II. EPA's TITLE VI REGULATIONS

EPA's Title VI regulations prohibit recipients of EPA financial assistance from adversely discriminating against persons on the basis of race, color, national origin or sex, 40 CFR § 7.30 (1984) or on the basis of handicap, 40 CFR § 7.45 (1990). The text of EPA's Title VI regulations makes clear, however, that these regulations were promulgated primarily, if not entirely, to prohibit recipients from discriminating in matters of services and benefits. There is not a single definition or paragraph in the regulations that indicate that EPA had conceived its Title VI regulations could be made applicable to issues of environmental discrimination. It would appear that EPA awoke to the possibility that regulation 40 CFR § 7.35(b), might be used in respect to environmental civil rights following the Presidential Executive Order and after Chester Residents in 1996 used it as the basis for a private environmental civil rights enforcement action in *Chester Residents v. Seif*, (PaDEP), 132 F3d 925 (3rd Cir. 1997) to prevent the Pennsylvania Department of Environmental Protection (Pa. DEP) from granting any more waste facility permits in their minority community. Regulation 40 CFR § 7.35(b) in relevant part reads as follows:

A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex...

In February 1998, the EPA finally published an "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits" (*Interim Guidance*) which in its final form is intended to serve as a supplement to the EPA's Title VI regulations, 40CFR §7.10 et seq., in respect to environmental civil rights matters. Now, after two and a half years of discussions, debates, comments and countless meetings the EPA has published for comment two interrelated guides: (1) Draft Revised Guidance For Investigating Title VI Administrative Complaints Challenging Permits (June 2000) (*Draft EPA Guidance*) and (2) Draft Title VI Guidance For EPA Assistance Recipients Administering Environmental Permitting Programs (June, 2000) (*Draft Recipient Guidance*).

To evaluate the efficacy of these *Guidances* to protect the environmental civil rights of minority communities it is necessary to evaluate them in the context of the EPA regulations which remain in effect. According to the *Draft EPA Guidance* the EPA will not accept a Title VI complaint prior to the grant of a state permit. (*Draft EPA Guidance*, p.19). See also 40 CFR § 7.120. And when EPA does receive a Title VI environmental civil rights complaint after the grant of a state permit the EPA will not seek a stay of the permit. (*Draft EPA Guidance*, p.27). These restrictions may have some purpose in respect to matters of services and benefits, but in respect to environmental civil rights they are disastrous because the state permittee will remain within his permit rights to continue to build or operate the challenged facility through the entire period that the EPA will be investigating the Title VI violation complaint. In fact, the permittee may continue to operate the facility even after the EPA finds a Title VI

violation because the permittee is not a party to the EPA investigation. The regulations do not authorize EPA to stay or rescind the state issued permit. The ultimate enforcement power of the EPA is termination of financial assistance to the state recipient, not revocation of the state action found to be in violation of Title VI. And even that financial assistance termination penalty is illusory because it can be applied only after the EPA gives 30 days notice to both houses of Congress. 42U.S.C. §2000d-1, 40 CFR § 7.130. These severe enforcement limitations on EPA authority strongly suggest that meaningful involvement of a minority community in environmental civil rights matters can only occur prior to the issuance of a permit by a state environmental protection department. It is for this reason that the *Draft Recipient Guidance* telling states how to conduct an environmental civil rights program that complies with Title VI is even more important than the *Draft EPA Guidance* in ensuring civil rights compliance.

### **III. THE DRAFT EPA GUIDANCE**

The *Draft EPA Guidance* now being proposed is essentially the same as the *Interim Guidance* which EPA presented in February 1998. It was opposed, for various reasons, by all members of the Implementation Advisory Committee (IAC) which had been organized by the EPA. See "Report of the Title VI Implementation Advisory Committee, Next Steps For The EPA, State and Local Environmental Justice Program" April 1, 1999, p.3,4. And more recently, at the May 23, 2000 Atlanta conference of the National Environmental Justice Advisory Council (NEJAC), the *Interim Guidance* received no support from any of the 250 attendees but was rejected by numerous speakers from private and governmental organizations.

Nonetheless, and contrary to the advice of the IAC and representatives of minority communities, the *Draft EPA Guidance* again proposes to use the *Interim Guidance's* complex and controversial "Adverse Disparate Impact Analysis" method for determining whether a state issued pollution control permit violates the civil rights of a minority community. The EPA method seeks to make this determination by cumulating the environmental polluting releases from the facility under review with the environmental polluting releases from other sources whose polluting releases may be affecting the same community (if these other sources of pollution are under the control of the same permitting agency) and from this problematic data to attempt to determine what the future adverse disparate health impact will be on the affected minority community. To accomplish this task the investigator must then determine whether this adverse impact will be sufficiently disparate in contrast to some other optional unpredictable community as to constitute a Title VI civil rights violation. The EPA method of analysis is replete with options that an investigator would be required to exercise in respect to the universe of sources to be included and excluded, the pollutants and nuisances (odors, noise, vibrations, broken roads, lead in the soil and houses) to be included or excluded, the various sciences to be used or not used and the sciences to be used or not used to determine the direct and the synergistic future health effects, and the optional reference communities to be studied for determining the sufficiency of disparity. The enumeration of these options entailed in the EPA analytic method makes obvious that the EPA method can only produce subjective determinations that will give rise to endless dispute between the states and EPA. Even the EPA recognizes this problem for it declares:

"The reliability, degree of scientific acceptance, and uncertainties of impact assessment methods varies greatly,. In each case, the investigation report is expected to include a discussion of uncertainties in the impact assessment, {EPA} expects to weigh these uncertainties in the data and methods as part of its decision process..."

*Draft EPA Guidance*, p.34, A guidance that is so complex and so uncertain that it requires a critique of the uncertainties in its investigative report is not the kind of guidance that will be understood or accepted by affected communities, particularly minority communities that already suffer from significantly disparate poor-public health.

Though the EPA's method would use all manner of data from various governmental and non-governmental sources to speculate about possible future health effects, primarily chronic effects, the EPA method never even suggests that a Title VI investigation should include the existing public health or the comparative public health of the affected community. The *Draft EPA Guidance*, therefore, assumes that the health effect of environmental pollution is the same for all communities. Such an assumption is incorrect. Communities with poor public health are more susceptible to disease than healthy communities exposed to a similarly polluted environment. See "*Toward Environmental Justice*." Institute of Medicine (National Academy Press) (1999) p.26 .

The filing requirements of a Title VI environmental civil rights complaint, pursuant to the *Draft EPA Guidance*, would eliminate most minority communities from filing complaints because of the amount, detail and complexity of the information to be provided. And the few communities able to file such a complaint would rarely have the monetary resources for expert and legal assistance needed to provide input to an Adverse Disparate Impact Analysis.

It should also be noted that while the EPA did support a private action to enforce EPA's Title VI regulation before EPA had published its *Interim Guidance*, *Chester Residents v. Seif*, (PaDEP)(1996-97), the adoption of the *Draft EPA Guidance* would make private enforcement actions almost impossible because of the complexity of the proof that the *Draft EPA Guidance* would require and because of the cost in litigating so amorphous a *Guidance*.

#### **IV. DRAFT RECIPIENTS GUIDANCE**

The *Draft Recipient Guidance*, constitutes EPA's suggestions to the states as to how they might administer Title VI so as to avoid or minimize Title VI environmental complaints to the EPA subsequent to a state's issuance of pollution control permits. Essentially it advocates that each state train a staff of Title VI investigator specialists who would be able to undertake the complex and uncertain Adverse Disparate Impact Analyses. Since it is doubtful that a state (or local) civil rights determination based on Adverse Disparate Impact Analysis would be accepted by either a losing putative permittee or by a losing minority community EPA should be prepared for a Title VI complaint from either the minority community or from the permit applicant who would claim that the state's Title VI analysis was in error. Instead of reducing the number of Title VI complaints the *Draft Recipient Guidance* may very well increase the number.

EPA should not require states to undertake the complex Adverse Disparate Impact Analysis to determine Title VI compliance. Instead EPA should allow the states to use a simple, transparent protocol which can be readily replicated by members of the affected community and by the permit applicant.



The first step of this protocol would define the affected area using a proximity formula. The EPA itself has suggested the use of proximity formulas for defining affected areas. (*Draft EPA Guidance*, p. 39). Next, using U.S. Census Bureau data (GIS) there would be a determination as to whether the affected area is a minority community, taking into account the percentage of minorities in the affected area in relation to the percentage of minorities in the county. This determination establishes whether a Title VI environmental civil rights investigation may be required.

The state, at this time, shall notify all residents of the affected area as well as the permit applicant whether the affected area is a minority area protected by Title VI. The state shall also inform them that the permit application would be denied if a subsequent Title VI investigation determines that the public health of the census tracts in the affected area is among the worst health census tract (20%, 25%, 30%) in the county (or state) unless the community and permit applicant negotiate an agreement to be included in the permit. If negotiations do not produce an agreement within (6 months, 9 months, 12 months) the state would then undertake its Title VI investigation. The State investigation would not be based on the EPA's proposed *Draft Revised Guidance* but would be based on a *Comparative Public Health Protocol* as outlined below. Should this investigation determine that the permit would violate Title VI the community and the applicant would then proceed in their own best interests.

## **V. THE TITLE VI COMPARATIVE PUBLIC HEALTH PROTOCOL**

At the first meeting of the Implementation Advisory Committee (IAC) (May 1998) the Public Interest Law Center of Philadelphia (Law Center) proposed an

alternative to the EPA's complex, uncertain, unreplicable and opaque Adverse Disparate Impact Analysis for determining a permit's compliance or violation of environmental civil rights under Title VI. The Law Center's alternative is based on the view that it is a violation of Title VI environmental civil rights to grant a pollution control permit for a facility that would be located in a minority community which presently suffers substantially disparate poor public health. The introduction of a pollution releasing facility into such a community will reduce the quality of that community's environment and adversely affect the public health of that community thereby increasing the disparity of the community's public health with respect to the other communities in the county or state.

Though the Law Center's alternative was presented more than two years ago the EPA has never explained why this approach is not an acceptable basis for determining Title VI environmental civil rights violations. Both the EPA and the Law Center proposals are based on disparate human health; the EPA's on speculative future health, the Law Center's on actual existing human health. Nor has the EPA explained why its Adverse Disparate Impact Analysis is acceptable though it is made in total disregard of the existing public health or comparative public health of the affected community.

The Law Center is aware that the EPA, at this time, cannot adopt a *Protocol* based on the use of comparative public health data because the EPA chose not to include it as a possible alternative for public comment. But EPA has been in possession of the Law Center's basic *Comparative Public Health Protocol* for over two years and owes all stakeholders an explanation for its failure to even acknowledge it. At the May, 2000 NEJAC Conference in Atlanta, in contrast to the criticism which the EPA's *Guidance*

received, there was very substantial support for the use of a public health based guidance. And EPA has received many letters of support for the adoption of a guidance based on comparative public health from representatives of public and private organizations. But none of this support is reflected in the *Draft EPA Guidance*.

The Law Center's Protocol is based on public health data collected from State, County, and City Health Departments. From this health data and from Census Bureau data it is not difficult to determine, on a census tract basis, the following 4 health factors:

- \* Age-Adjusted Cancer Mortality Rate
- \* Age-Adjusted Non-Cancer Mortality Rate
- \* Infant Mortality Rate
- \* Low Birth Weight Rate

The Institute of Medicine has selected these same four health factors for determining disparities in public health among communities, *Toward Environmental Justice*, p. 12, 13. These four factors can be combined into a single public health index so as to compare the public health status of the census tracts in the county (or state). If the affected minority area contains a census tract which is among the worst health census tract (20%, 25%, 30%) in the county (or state) the state shall not grant a pollution control permit unless there is a negotiated agreement between the community and the permit applicant which the state agrees to include in the permit.

## VI. CONCLUSION

The EPA's *Draft Revised Guidance* should be withdrawn. It will not

protect minority communities against civil rights violations. It is a paper tiger. It may generate a lot of paper but it will not protect any minority community. What is needed to prevent environmental civil rights violations is a simple transparent guidance, easily replicated and designed to protect minority communities with poor health. EPA owes the country an explanation as to why it refuses to propose such a *Guidance*.

Respectfully submitted,

Jerome Balter  
Director  
Environmental Law Project

JB/Jm

# **Public Listening Sessions on EPA's Draft Title VI Guidance Documents**

**Title VI of the Civil Rights Act of 1964, as amended (Title VI), prohibits recipients of federal financial assistance from intentionally discriminating in any programs on the basis of race, color, or national origin. EPA's Title VI implementing regulations prohibit recipients of federal funding from engaging in any activities, including permitting actions, that are intentionally discriminatory or have a discriminatory effect based on race, color, or national origin.**

**On June 16, 2000, EPA issued two draft Title VI guidance documents for public comment. They are available online (<http://www.epa.gov/civilrights>) and were published in the Federal Register on June 27, 2000. EPA will accept public comments on the draft guidance documents for 60 days (until August 28, 2000).**

**EPA is hosting a series of public listening sessions during which EPA will receive public comments on the proposed guidance documents. These sessions will be held:**

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| <b>August 1, 2000: 4:00-7:00 p.m.<br/>EPA Region 2 Office<br/>290 Broadway, Room 27A<br/>New York, NY<br/>Contact: Doug White, 212-637-5032</b>   | <b>August 2, 2000: 6:00-9:00 p.m.<br/>Carson Community Center, Hall A<br/>801 East Carson Street<br/>Los Angeles, CA<br/>Contact: Carla Moore, 415-744-1938 or<br/>Joann Asami, 415-744-1359</b> |
| <b>August 3, 2000: 6:00-9:00 p.m.<br/>Henry J. Kaiser Convention Center<br/>10 10<sup>th</sup> Street<br/>Oakland, CA<br/>Contact: Carla Moore, 415-744-1938 or<br/>Joann Asami, 415-744-1359</b> | <b>August 9, 2000: 4:00-7:00 p.m.<br/>Shenandoah Room, 1650 Arch Street<br/>Philadelphia, PA<br/>Contact: Daniel Isales, 215-814-2647<br/>Reservation Confirmation: 215-814-2950</b>             |

**Written comments should be directed to: Title VI Guidance Comments, U.S. Environmental Protection Agency, Office of Civil Rights (1201 A), 1200 Pennsylvania Avenue NW, Washington, DC 20460. Comments can also be submitted electronically to [civilrights@epa.gov](mailto:civilrights@epa.gov). All comments must be submitted to EPA by August 28, 2000.**